National Energy Board | Office national de l'énergie

Reasons for Decision

Enbridge Southern Lights GP Inc.

RH-1-2011

February 2012

Tolls

Canada

National Energy Board

Reasons for Decision

In the Matter of

Enbridge Southern Lights GP Inc.

Complaint by Imperial Oil Limited In Respect of NEB Tariffs No. 1 and No. 2 for Service on the Southern Lights Pipeline

RH-1-2011

February 2012

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Glossary

Adjustments	adjustments to the 2010 and 2011 cost of service calculations for the Southern Lights Pipeline requested by Imperial Oil Limited
AFUDC	Allowance for Funds Used During Construction
bbl	barrel or barrels
Board or NEB	National Energy Board
BP Canada	BP Canada Energy Company
b/d	barrels per day
Committed Shippers	shippers on the Southern Lights Pipeline who signed up for long-term shipping agreements; specifically, BP Canada and Statoil North America, Inc.
Committed Toll	toll charged for committed service on the Canadian portion of the Southern Lights Pipeline
Committed Volume Credit	the credit paid to a Committed Shipper for uncommitted volumes shipped in the previous year, up to a maximum of the shipper's total Monthly Deficiency Quantity for that year
Effective Committed Toll	net amount charged for committed service on the Southern Lights Pipeline after the revenue from uncommitted volumes is refunded to shippers
Effective Toll	net amount charged for service on the Southern Lights Pipeline after the revenue from uncommitted volumes is refunded to shippers
Effective Uncommitted Toll	net amount charged for uncommitted service on the Southern Lights Pipeline after the revenue from uncommitted volumes is refunded to shippers
EPI	Enbridge Pipelines Inc.
ESL	Enbridge Southern Lights GP Inc.
ESLLP	Enbridge Southern Lights LP
ESL Toll	toll charged for service on the Southern Lights Pipeline
Imperial	Imperial Oil Limited
m^3	cubic metres

m^3/d	cubic metres per day
Monthly Deficiency Quantity	the amount by which a shipper's committed volume for a given month exceeds the actual volume shipped by the shipper in the same month
NEB Act	*National Energy Board Act*
OPUAR	*Oil Pipeline Uniform Accounting Regulations*
Posted Committed Toll	Committed Toll posted in ESL's tolls tariff
Posted Uncommitted Toll	Uncommitted Toll posted in ESL's tolls tariff
Posted Tolls	tolls posted in current ESL's tolls tariff
Project	Southern Lights Project including, among other components, the construction of the Southern Lights Pipeline; the Project was considered and approved by the Board in OH-3-2007 Reasons for Decision
Rebate Mechanism	the method for calculating the repayment to shippers for revenue from uncommitted volumes shipped on the Southern Lights Pipeline
ROFO	right of first offer for Committed Shippers for new committed capacity offerings on the Southern Lights Pipeline, set out in section 6.06 of the Southern Lights Pipeline Transportation Services Agreement
SNA	Statoil North America, Inc.
Southern Lights Pipeline	diluent pipeline operated by ESL that extends from the United States - Canada border near Gretna, Manitoba to Edmonton, Alberta
Tariff 1	NEB Tariff No. 1 - Rules and Regulations for service on the Southern Lights Pipeline, effective from 1 July 2010 to 31 December 2010, made interim effective 1 November 2010
Tariff 2	NEB Tariff No. 2 - Toll for service on the Southern Lights Pipeline, effective from 1 July 2010 to 31 December 2010, made interim effective 1 November 2010
Tariff 3	NEB Tariff No. 3 - Rules and Regulations for service on the Southern Lights Pipeline, effective as interim as of 1 January 2011

Tariff 4	NEB Tariff No. 4 - Toll for service on the Southern Lights Pipeline, effective as interim as of 1 January 2011
Toll Ratio	the ratio of the Uncommitted Toll compared to the Committed Toll
TSA	Transportation Services Agreement for service on the Southern Lights Pipeline signed by Committed Shippers
Uncommitted Shippers	shippers who are not Committed Shippers and who nominate diluent volumes on a monthly basis for transportation on the Southern Lights Pipeline
Uncommitted Toll	toll charged for uncommitted service on the Southern Lights Pipeline
US	United States
US Southern Lights Pipeline	diluent pipeline that extends from Manhattan, Illinois to the US - Canada border near Gretna, Manitoba where it connects with the Southern Lights Pipeline
$	Canadian dollars
$US	US dollars

Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* and the Regulations made thereunder; and

IN THE MATTER OF a complaint by Imperial Oil Limited on 1 September 2010 with respect to Enbridge Southern Lights GP Inc. NEB Tariffs No. 1 and No. 2, filed with the Board under file OF-Tolls-Group2-E242-TFGen-01 01; and

IN THE MATTER OF National Energy Board Hearing Order RH-1-2011;

HEARD in Calgary, Alberta on 15, 16, 17, 18 and 22 November 2011;

BEFORE:

K. Bateman	Presiding Member
G. Habib	Member
L. Mercier	Member

Appearances	**Participants**	**Witnesses**
Applicant		
D. G. Davies B. Ho	Enbridge Southern Lights GP Inc.	J. Garcia M. Hrynchysyn D. Thompson N. Earnest
Companies		
A.L. McLarty, Q.C. M.L. Voinorosky	BP Canada Energy Company	D. Robostan G. Maxwell M. O'Loughlin J. Church
R. M. Perrin P. Osadetz C.E. Brett	Imperial Oil Limited	T. Knight M. Wheeler A. Safir H. J. Roman E. Crowe H. Johnson
L. E. Smith	Statoil North America Inc.	F. Rasmussen
Governments		
C. King	Alberta Department of Energy	
H. Gitersos	National Energy Board	

Chapter 1

Executive Summary

On 31 May 2010, Enbridge Southern Lights GP Inc. (ESL), on behalf of Enbridge Southern Lights LP (ESLLP), and Enbridge Pipelines Inc. (EPI) submitted NEB Tariff No. 1 (Tariff 1) and NEB Tariff No. 2 (Tariff 2) for service on the Southern Lights Pipeline to the National Energy Board (Board or NEB). The Tariffs became effective on 1 July 2010, the pipeline's planned in-service date. Tariff 1 set out the rules and regulations and Tariff 2 established the toll for service (ESL Toll) on the line. In Tariff 2, the toll for uncommitted service (Uncommitted Toll) is twice the toll for committed service (Committed Toll).

On 1 September 2010, Imperial Oil Limited (Imperial) submitted a complaint with respect to the ESL Toll. After considering the complaint and submissions from ESL and other interested persons, the Board directed that the ESL Toll be made interim effective 1 November 2010. The Board subsequently established the RH-1-2011 toll proceeding to hear the Imperial complaint, with ESL as the applicant and Imperial as an intervenor.

Taking into account all the evidence submitted in the RH-1-2011 proceeding, the Board finds the ESL Committed and Uncommitted Tolls to be just and reasonable for the reasons given in this Reasons for Decision. The Board also finds that the Uncommitted Toll is not unjustly discriminatory or an impediment to access.

The Board therefore approves Tariffs 1 and 2 as filed. The Board has issued Toll Order TO-02-2010 to this effect. Accordingly, the Board denies the relief requested by Imperial.

Chapter 2

Background

2.1 Southern Lights Project

On 9 March 2007, ESL, on behalf of ESLLP, and EPI applied to the Board, pursuant to Part III of the *National Energy Board Act* (NEB Act), for approval of the Southern Lights Project (Project). The Project comprised several components, including, the construction and operation of the Southern Lights Pipeline.[1] The Board considered and approved the Project in the OH-3-2007 proceeding.

The Southern Lights Pipeline opened for service on 1 July 2010. It carries diluent from the Canadian border with the United States (US) near Gretna, Manitoba to Edmonton, Alberta, for distribution to the heavy oil and bitumen producing areas in Alberta and Saskatchewan (Figure 2-1). In these regions, the diluent is blended with the heavy crude oil and bitumen to facilitate transportation by pipeline. The Southern Lights Pipeline throughput capacity totals 28 617 cubic metres per day (m^3/d), or 180,000 barrels per day (b/d). It receives diluent from Manhattan, Illinois through the extension of the pipeline in the US (US Southern Lights Pipeline).

2.2 OH-3-2007 Part IV Matters

Application

In its March 2007 application for the Project, ESL, on behalf of ESLLP, also requested approval pursuant to Part IV of the NEB Act, of the toll principles and transportation tariff for service on the Southern Lights Pipeline. The toll principles were outlined in Schedule B to the Southern Lights Pipeline Transportation Services Agreement (TSA). In accordance with the TSA, the initial group of Committed Shippers would back the revenue requirement for the first 15 years of service on the Southern Lights Pipeline.[2] The toll for transporting uncommitted volumes (Uncommitted Toll) would be at least twice the toll for service for transporting committed volumes (Committed Toll). The toll principles and the tariff were the product of negotiation between ESL, on behalf of ESLLP, and the shippers who signed TSAs (Committed Shippers).

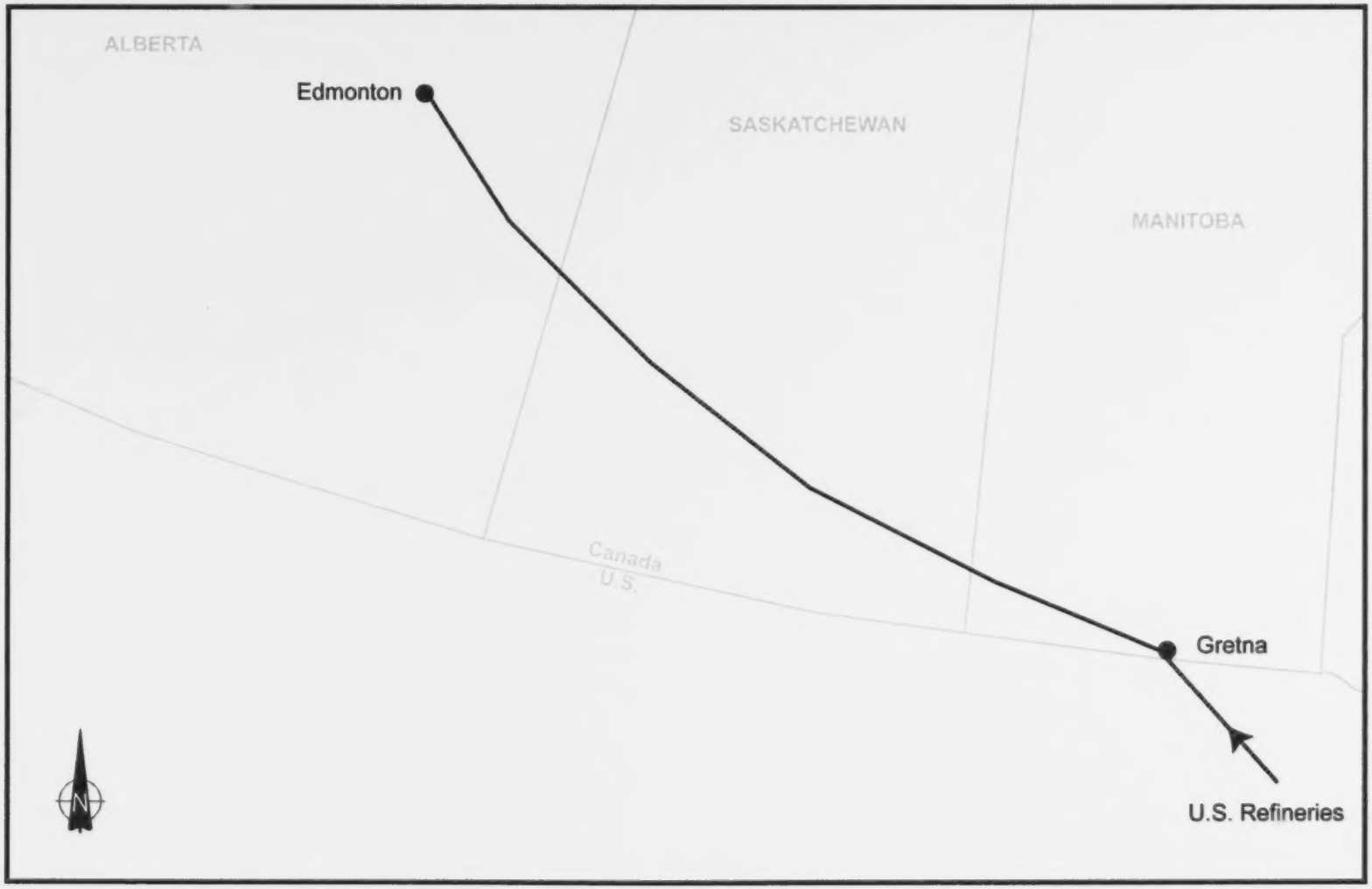
During the OH-3-2007 proceeding, ESL, on behalf of ESLLP, advised that it had held two Open Seasons to solicit long-term commitments to ship diluent on the Southern Lights Pipeline. Future Open Seasons, with somewhat similar terms and conditions to the existing TSA, were possible. The contract term would be for the remainder of the 15-year term undertaken by the Committed Shippers and there would be some adjustments to the proposed TSAs given that certain termination clauses would no longer be relevant.

---

1 Under the Project, EPI's Line 13 was removed from southbound crude oil service and reversed to transport diluent. The OH-3-2007 Reasons for Decision commonly refers to the Southern Lights Pipeline as the "Line 13 Reversal".

2 Committed Shippers are shippers who signed up for long-term shipping agreements on the Southern Lights Pipeline.

Figure 2-1
Southern Lights Pipeline



Board Decision

In the OH-3-2007 Reasons for Decision, the Board noted that no intervenor objected to the toll principles. With respect to future capacity offerings, the Board noted that Committed Shippers had been provided with the right of first refusal should another Open Season be contemplated. The Board further noted that no potential shipper had come forward to indicate a firm intention to ship on an ongoing basis, or to dispute the fairness of the right of first refusal for Committed Shippers.

After considering all the evidence submitted, the Board approved both the toll principles and the tariff for the Southern Lights Pipeline. The Board observed that the toll principles and diluent tariff were the result of agreements with Committed Shippers, and therefore, accepted them as a package. The Board also discussed the ESL's obligation as a common carrier to provide service with reasonable terms and conditions. It decided to monitor the application of the approved toll principles to ensure they continue to result in just and reasonable tolls.

2.3 OH-3-2007 Financial Regulation Determination

ESL, on behalf of ESLLP, requested that the Board regulate it as a Group 2 company on a complaint basis, so long as Group 2 status did not prevent the Board from approving its toll and tariff principles. If that outcome were not possible, it requested Group 1 status along with approval of the principles. The Board concluded that ESL should be designated as a Group 2 company, given that the toll principles were negotiated with Committed Shippers and that the pipeline ships only one product on a single line.

However, because it would be the first diluent line to be regulated by the NEB, the Board determined that additional regulatory oversight would be appropriate to ensure that all shippers who nominate volumes to the line are granted reasonable access, and that the Uncommitted Toll premium does not become an unreasonable impediment to potential spot shippers. Therefore, in addition to complying with requirements for all Group 2 companies set out in subsection 5(2) of the *Oil Pipeline Uniform Accounting Regulations* (OPUAR), the Board required ESL to file supporting documentation for all toll filings submitted pursuant to paragraph 60(1)(a) of the NEB Act. It also imposed additional annual filing requirements, including the requirement to file information relating to both committed and uncommitted diluent volumes transported on the Southern Lights Pipeline and the revenue from those shipments. Further, the Board noted that if a dispute were to arise respecting the toll charged, or the terms of access to or transportation on the pipeline, all shippers, whether they have signed long-term TSAs or not, would have the right to complain to the Board.

2.4 Southern Lights Pipeline Tariff Filings

On 31 May 2010, ESL, on behalf of ESLLP, and EPI filed with the Board pursuant to paragraph 60(1)(b) of the NEB Act, Tariffs 1 and 2 for service on the Southern Lights Pipeline. Tariff 1 set out the rules and regulations for service, and Tariff 2 listed the ESL Toll, including the Posted Committed Toll and Posted Uncommitted Toll. The Posted Committed Toll in Tariff 2 is $12.136 per cubic metre ($m^3$) or $1.9296 per barrel (bbl) and the Posted Uncommitted Toll is $24.272 per m^3 ($3.8590 per bbl).

ESL, on behalf of ESLLP, and EPI indicated that Tariffs 1 and 2 would be effective 1 July 2010, the planned in-service date for the Southern Lights Pipeline. Following the receipt of the toll complaint from Imperial, the Board made Tariffs 1 and 2 interim effective 1 November 2010 (see sections 3.1 and 3.2 in Chapter 3, and Appendix I).

ESL, on behalf of ESLLP, submitted NEB Tariff No. 3 (Tariff 3) and NEB Tariff No. 4 (Tariff 4) on 6 December 2010. Both Tariffs were to become effective 1 January 2011, replacing Tariffs 1 and 2 respectively at that time. ESL requested that the Board approve the revised ESL Toll in accordance with Tariffs 3 and 4 as interim, pursuant to subsection 19(2) of the NEB Act, until the Board otherwise directs. The Posted Committed Toll for 2011 in Tariff 4 is $13.818 per m^3 ($2.211 per bbl); the Posted Uncommitted Toll is $27.818 per m^3 ($4.422 per bbl).

The Board approved Tariff 3 and Tariff 4 as interim in Order AO-1-TOI-05-2010, issued on 29 December 2010 (see Appendix I).

Chapter 3

Regulatory Process

3.1 Imperial Complaint

By letter to the Board dated 10 June 2010, Imperial submitted that the 2010 toll filing from ESL, on behalf of ESLLP, and EPI did not provide sufficient information to permit interested shippers to assess the ESL Toll or demonstrate that the Uncommitted Toll on the Southern Lights Pipeline is just and reasonable. Imperial suggested that the Board make the ESL Toll interim until ESL provided sufficient information to permit interested persons and the Board to determine that the requested tolls are just and reasonable.

In its 18 June 2010 response, ESL, on behalf of ESLLP, and EPI indicated they had sent Imperial information to support the calculation of the Committed Toll. They noted that Imperial had filed a comment letter, not a complaint; therefore, there was no need or reason for the Board to take any action.

On 1 September 2010, Imperial submitted a complaint with respect to the tolls in Tariffs 1 and 2. It requested that the Board examine the ESL Toll and make it interim and refundable pending the Board's determination of whether it is just and reasonable. Imperial also asked the Board to establish a public hearing to examine the ESL Toll.

3.2 Board Process to Hear the Complaint

On 17 September 2010, the Board invited comments regarding Imperial's complaint and the appropriate process for its consideration. After considering the comments received from ESL, Imperial, BP Canada Energy Company (BP Canada), Statoil North America, Inc. (SNA) and Husky Energy Marketing Inc., the Board issued Order TOI-05-2010 (see Appendix I) making Tariffs 1 and 2 interim effective 1 November 2010. The Board directed that the ESL Toll remain interim until it rules on the merits of Imperial's complaint or until it otherwise directs.

On 8 December 2010, the Board requested additional information from Imperial with respect to its complaint. Following Imperial's response and subsequent comments from ESL and Imperial, the Board established the RH-1-2011 proceeding to hear the complaint, with ESL as the applicant and Imperial as an intervenor. Appendix II contains the RH-1-2011 List of Issues.

3.3 Additional Relief Requested by Imperial

As part of its written evidence in the RH-1-2011 proceeding, Imperial requested the following relief from the Board:

a. An Order denying approval of Tariffs 1, 2, 3 and 4.

b. A determination that the application of the toll principles results in a toll which is unjust and unreasonable, that the Uncommitted Toll is unjustly discriminatory, and that the Uncommitted Toll is an unreasonable impediment to potential Uncommitted Shippers.[3]

c. An Order which:

i. fixes the Posted Uncommitted Toll at a premium of not more than 20 percent above the Posted Committed Toll;

ii. requires ESL to make a reasonable forecast of uncommitted volumes for each year and make allowance for the payment of tolls for this service in its revenue requirement for that year;

iii. addresses accounting issues arising from cost of service and rate base calculations, including orders which:

1. amend the cost of debt used in calculating the cost of service for both 2010 and 2011;

2. exclude the debt service reserve from the rate base applicable to the Southern Lights Pipeline in Canada;

3. adjust upfront debt issue costs to reflect the five-year amortization schedule used by ESL in its financial reports;

4. standardize the calculation of the allowance for funds used during construction (AFUDC) in order to ensure that plant balances and an appropriate cost of debt for the AFUDC are accurately reflected in ESL's rate base calculations;

5. account accurately for income tax losses including:

(a) capital cost allowances credited to ESL's affiliates; and

(b) AFUDC debt;

iv. directs ESL to establish a deferral account to record:

1. the variance between the forecast and actual revenue received;

2. the variance between forecast and actual operating costs; and

3. carrying charges based on the carrier's weighted average cost of capital on the monthly balance, which charges are to be continued until amortization of the deferral account;

v. directs ESL to credit or debit the amount in the deferral account into the subsequent year's revenue requirement.

---

3 Uncommitted Shippers are shippers who are not Committed Shippers and who nominate diluent volumes on a monthly basis for transportation on the Southern Lights Pipeline.

d. An order striking:

   i. section 6.06 of the TSA; and

   ii. section 15 of the toll principles in Schedule B to the TSA to deny the carrier incentive provided therein.

e. A direction to ESL to prepare and re-file tariffs containing tolls consistent with Imperial's evidence.

f. Such further and other relief as deemed necessary by the Board.

3.4 Pre-Hearing Rulings and Decisions

Relationship between RH-1-2011 and the OH-3-2007 Reasons for Decision and List of Issues

Following the issuance of the RH-1-2011 Hearing Order, ESL, Imperial, BP Canada and SNA asked the Board to clarify the relationship between the RH-1-2011 proceeding and the Board's OH-3-2007 Reasons for Decision. They also sought clarification regarding the RH-1-2001 List of Issues. The Board responded to the clarification requests by letter dated 29 April 2011 (Appendix III).

With respect to the relationship between the OH-3-2007 Reasons for Decision and the RH-1-2011 proceeding, the Board noted that while it had accepted the methodology, toll principles and TSA for service on the Southern Lights Pipeline in the OH-3-2007 proceeding, its decision in that proceeding did not bind the Board in future Part IV determinations. When there is a complaint, the Board may decide to examine a toll to make sure that tolls are just and reasonable. Subsequent to the release of the OH-3-2007 Reasons for Decision, ESL filed with the Board the toll for service on the Southern Lights Pipeline. Shortly thereafter, Imperial filed a complaint with respect to the ESL Toll. The Board established the RH-1-2011 proceeding to examine the ESL Toll. It was not conducting a review and variance of the OH-3-2007 Reasons for Decision, as contemplated in section 21 of the NEB Act, nor did Imperial apply for a review.

With respect to the List of Issues, the Board noted that it established the RH-1-2011 proceeding to hear matters related to the Committed and Uncommitted Tolls on the Southern Lights Pipeline. The Board did not intend that the RH-1-2011 proceeding would examine potential barriers to access that are not related to tolling; however, concerns about access due to the Uncommitted Toll were addressed by Issue 3 of the RH-1-2011 Hearing Order. The Board recognized that consideration of Issue 3 could include examining sections of the toll principles, Tariffs and the TSA related to whether the tolls are an unreasonable impediment to access.

ESL Motion to Strike Certain Portions of Imperial's Evidence from the Record

Following the submission of intervenor evidence, ESL filed a Notice of Motion requesting that the Board strike certain portions of Imperial's evidence, related to renewal and pre-emptive rights, from the RH-1-2011 record. It also objected to Imperial's request for the Board to strike section 6.06 of the TSA. ESL submitted that this request was outside the scope of the RH-1-2011 proceeding.

In its 30 August 2011 ruling (Appendix IV), the Board stated that its overriding consideration is to have a complete record on which to base its decision. After considering the Notice of Motion and related submissions, the Board was of the view that Imperial had shown an arguable connection between the portions of the Imperial evidence that were the subject of the Notice of Motion and Issue 3 of the Hearing Order. The Board also stated that it would consider the underlying toll principles, Tariffs and TSA, including section 6.06 of the TSA, to the extent that they are relevant to the RH-1-2011 List of Issues. Although it was not prepared to strike the evidence in question at that time, the Board noted that it could be the subject of future submissions concerning appropriate weight to be given.

Chapter 4

Market Context

4.1 Southern Lights Pipeline Open Seasons

The first Open Season to solicit commitments to ship diluent on the Southern Lights Pipeline took place from 30 May to 30 June 2006. The TSA in this Open Season contained, among other terms, a 1.5 to 1 ratio for the Uncommitted Toll compared to the Committed Toll (Toll Ratio). No shippers signed up; however, three shippers expressed interest in using the Southern Lights Pipeline. Following negotiations with these shippers, the TSA was revised and the Open Season was extended to 14 July 2006.

The revised TSA increased the Toll Ratio to at least 2 to 1 and introduced a right of first offer for Committed Shippers in future committed capacity offerings (ROFO).[4] The ROFO provides Committed Shippers with a pre-emptive right to acquire additional committed capacity from available capacity, up to their current *pro-rata* share of committed capacity. This provision is triggered prior to any further Open Seasons initiated by ESL. Additional capacity need not be offered to other potential shippers in order for Committed Shippers to act upon this right. The revised TSA also included other negotiated changes, including exit gates to allow Committed Shippers to terminate the agreement in certain circumstances.

The extended Open Season resulted in three shippers committing to transport a total of 25 755 m^3/d (162,000 b/d) for 15 years. In September 2006, one of the shippers exercised its termination right, thus dropping the total committed volume to 12 234 m^3/d (77,000 b/d). Pursuant to the ROFO, ESL offered the relinquished committed capacity to the remaining Committed Shippers, but they declined to exercise their rights.

A second Open Season in February and March of 2007 offered terms and conditions similar to those in the extended Open Season. No other shipper signed up for committed service during this process.

4.2 Southern Lights Pipeline Toll Design

The TSA between ESLLP and Committed Shippers, and the toll principles which were approved by the Board in the OH-3-2007 Reasons for Decision include, among other terms, the following.

Committed Toll

- The ESL Toll is based on cost of service. The Posted Committed Toll is the estimated annual revenue requirement divided by the total committed volume (12 234 m^3/d or 77,000 b/d).

4 The ROFO is found in section 6.06 of the TSA.

- Over the 15-year term of the TSA, each Committed Shipper is accountable for paying the Committed Toll for its committed volume on a monthly basis, whether or not the volumes are shipped. Therefore, Committed Shippers pay 100 percent of the revenue requirement for 15 years if there are no volumes shipped by Uncommitted Shippers.
- The annual true-up of the Posted Committed Toll to account for actual revenue relative to the actual cost of service will normally occur as soon as reasonably practicable after the end of each year.

Uncommitted Toll

- The Posted Uncommitted Toll for shipments of uncommitted volumes is twice the Posted Committed Toll.

Committed Volume Credit

- Should a Committed Shipper not ship its full, or any, committed volume in any month of a given year, but ship uncommitted volumes in any month in that same year, the Committed Shipper will receive a Committed Volume Credit in the following year for the uncommitted volumes it shipped, up to a maximum of its total Monthly Deficiency Quantity for the year.[5]

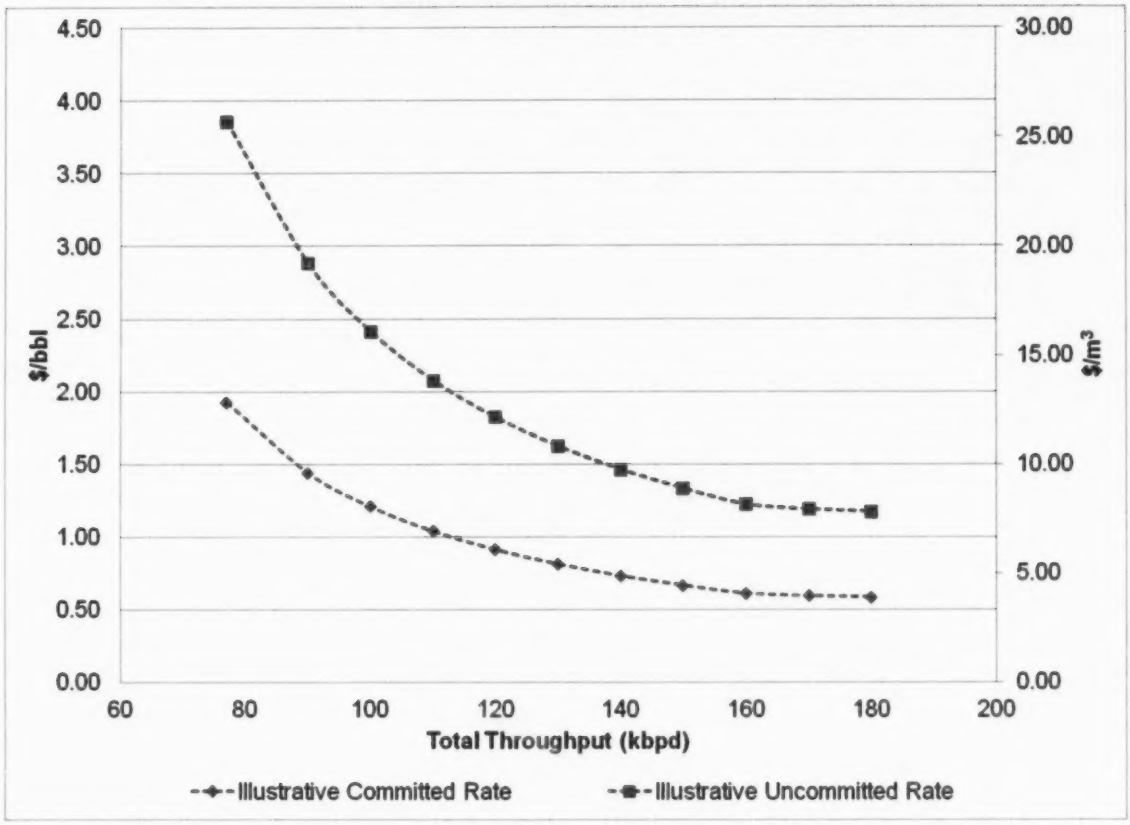
Rebate Mechanism for Uncommitted Toll Payments

- ESL will refund to all shippers at the end of each full calendar year, 100 percent of the revenue collected for uncommitted volumes up to and including 25 755 m^3/d (162,000 b/d), and 75 percent of revenue for uncommitted volumes over 25 755 m^3/d (162,000 b/d), net of Committed Shipper Volume Credits and the true-up between the forecast and actual revenue requirement; the refund will be paid for all volumes, committed and uncommitted, proportional to the Toll for service. ESL will retain 25 percent of the revenue from uncommitted volumes in excess of 25 755 m^3/d (162,000 b/d).

ESL provided an illustrative graph (Figure 4-1) depicting the net payment for transportation following the year-end refund per the Rebate Mechanism, as greater uncommitted volumes are shipped on the Southern Lights Pipeline. The graph demonstrates that the Rebate Mechanism will always result in the Effective Uncommitted Toll being twice the Effective Committed Toll.

5 The Monthly Deficiency Quantity is the amount by which a shipper's Committed Volume for a given month exceeds the actual volume shipped by the shipper in the same month.

Figure 4-1
Illustrative Effective Committed and Uncommitted Tolls



4.3 Throughput on the Southern Lights Pipeline

2010 Throughput

The Southern Lights Pipeline was underutilized in 2010. From July through December, actual committed shipments averaged approximately 6 856 m^3/d (43,000 b/d), or 56 percent of the volumes contracted by Committed Shippers and 24 percent of the pipeline's capacity. Uncommitted Shippers did not ship any volumes. Although the Southern Lights Pipeline transported some uncommitted volumes for a Committed Shipper, the Uncommitted Toll payment was fully refunded to the Committed Shipper as a Committed Volume Credit. As a result, Committed Shippers paid an average rate of $21.67 per m^3 ($3.34 per bbl) for volumes actually transported.

2011 Throughput

From January to September 2011 inclusive, throughput on the Southern Lights Pipeline averaged 10 334 m^3/d (65, 000 b/d), approximately 84 percent of the committed volume and 36 percent of the pipeline's capacity.

Throughput Expectations

During the OH-3-2007 proceeding, ESL, on behalf of ESLLP, and EPI submitted that bitumen production would increase in the subsequent 10 years, consequentially increasing the demand for imported diluent. In its OH-3-2007 Reasons for Decision, the Board stated that it considered this assessment of projected diluent demand to be reasonable.

All parties to RH-1-2011 proceeding agreed that bitumen production has grown and is anticipated to continue to grow as new developments come on stream. Parties also agreed that the demand for imported diluent in western Canada to transport bitumen will increase in line with growing bitumen production, and that increased demand for imported diluent will likely result in increased throughput on the Southern Lights Pipeline at some point within the 2013 to 2014 timeframe and in subsequent years.

Chapter 5

Tolls

5.1 Is the Committed Toll Just and Reasonable?

Views of Imperial

Imperial noted that under sections 62 and 67 of the NEB Act, the Board must determine that tolls are just and reasonable and not unduly discriminatory. Imperial stated that it takes no position regarding whether the toll principles applicable to the Southern Lights Pipeline at the time of approval by the Board in the OH-3-2007 Reasons for Decision complied with the NEB Act. The NEB Act requires the tolls, rather than the toll principles, to be just and reasonable and not unjustly discriminatory. Accordingly, if application of the toll principles results in tolls which are contrary to the NEB Act, then the toll principles must be modified. Given the hypothetical nature of the tolls presented in the OH-3-2007 proceeding, Imperial stated it was not until the actual ESL Toll was filed in Tariff 2 that Imperial decided to file a complaint with the Board.

Imperial stated that ESL had not provided any of the data required for the determination of the Committed Toll when it filed Tariffs 1 and 2 on 31 May 2010. It further stated that the toll principles require ESL to estimate, in advance for each year, the total cost of service for the year. This process requires, among other matters, determination of the calculation of the contracted equity return, cost of debt, depreciation, income tax allowance and operating expenses of the Southern Lights Pipeline for the year.

Imperial noted that in this proceeding, ESL identified a rate base of $542.7 million, while in the OH-3-2007 proceeding ESL advised that the capital cost of the Southern Lights Pipeline would be approximately $384 million.

Imperial stated that elements of the cost of service significantly overstate the actual costs incurred and the following adjustments should be made to the 2010 and 2011 cost of service calculations (Adjustments):

- amend the cost of debt used in calculating the cost of service for 2010 and 2011 by using ESL's actual cost of debt;
- exclude the debt service reserve from the rate base applicable to the Southern Lights Pipeline, consistent with some past Board decisions;
- adjust upfront debt costs to reflect the five-year amortization schedule used by ESL in its financial reports;
- standardize the calculation of the AFUDC in order to ensure that plant balances and an appropriate cost of debt for the AFUDC are accurately reflected in ESL's rate base calculations; and

- account accurately for income tax losses to adjust for the capital cost allowances credited to ESL's affiliates and the change in AFUDC.

The Adjustments, if implemented, would result in an increase in the Posted Committed Toll of six percent in 2010 and a decrease of seven percent in 2011.

Imperial submitted that ESL's Rebate Mechanism results in large uncertainty. Imperial further stated that in order for Uncommitted Shippers to properly calculate the Effective Uncommitted Toll, the Rebate Mechanism requires shippers to guess the actual level of the rebate, and therefore what the Effective Uncommitted Toll will be. Imperial requested that the Board order ESL to calculate the Posted Toll on a cost of service basis less a reasonable forecast of Uncommitted Toll revenue.

Views of ESL

ESL stated that the Board approved the toll principles in the TSA as just and reasonable in the OH-3-2007 Reasons for Decision. It further stated that ESL calculated both the Committed Toll and the Uncommitted Toll in Tariff 2 as provided for within the TSA. In ESL's view, no regulatory or market developments have occurred since the OH-3-2007 Reasons for Decision to cause the Board to revisit this decision. ESL also showed that the estimated tolls provided during the OH-3-2007 proceeding were higher than the tolls in Tariff 2.

In response to Imperial's statement that ESL had not provided any of the data required for the determination of the Committed Toll when it filed the Tariffs, ESL provided the following information in support of the Posted Tolls:

- audited financial statements for the years 2006 to 2010;
- cost of debt details;
- rate base details;
- supporting calculations for the tolls in Tariffs 1 and 2;
- property in service cost details;
- cost transfer details of the Southern Lights Pipeline;
- details of costs to construct the new light sour line portion of the Project;
- details of income tax component in the revenue requirement; and
- details of operating costs in the revenue requirement.

ESL stated that the financing for the Southern Lights Pipeline closed in September 2008, just as the financial market collapse was developing. Attractive financing rates were attained based on three key strengths: the TSAs, the credit quality of the Committed Shippers, and EPI being the construction manager or operator. The TSAs executed by both shippers are designated in the security package as material project documents. Any change made to them without the unanimous consent of all 21 lenders could become an event of default and place the entire debt funding at risk. Even if there were unanimous consent to change, it would likely require

reassessment of the risk profile of the Project, which could introduce a re-pricing of the borrowing rates or a fee event for each of the 21 lenders.

With respect to Imperial's requests for the Adjustments, ESL stated that there is no basis for the amendment to the cost of debt used in calculating the cost of service in 2010 and 2011 because interest rates will be trued up to actual in the year-end reconciliations. There is no reason to exclude the debt service reserve from the rate base as the reserve is a requirement of the Southern Lights Pipeline credit agreement and ESL incurs costs in respect of it. It further stated that there is no reason to adjust the upfront debt costs as the amortization of these costs is based on the rates set out in Schedule D of the TSA. ESL also submitted that AFUDC should not be adjusted as it was calculated using actual rates at the time of construction. ESL stated that the $3.724 million capital cost allowance was credited to EPI's mainline shippers.

ESL also stated that the Southern Lights Pipeline construction cost estimate of $384 million was provided to Committed Shippers in 2006. A revised estimate of $559 million was reviewed with Committed Shippers in 2007. While some of the increase was due to scope changes and more winter construction, the majority of the increase was due to higher engineering and construction costs attributable to the overheated market at the time.

Dr. Jaffe, on behalf of ESL, stated that the approach advocated by Imperial is an *ex post* economic analysis – that is, it takes the completion of the Southern Lights Pipeline as a given and, on that basis, assesses the desirability of different toll principles. Imperial ignores that the toll principles, negotiated with the Committed Shippers and approved by the Board in the OH-3-2007 Reasons for Decision, were required for the Project to proceed in the first place.

Views of BP Canada

The ESL toll methodology was established through an Open Season process. BP Canada submitted that no unfairness or complaint was raised in respect of the Open Season, and that all potential shippers, including Imperial, had the opportunity to participate.

The Southern Lights Pipeline toll design was set up to ensure that investment costs are likely to be recovered so that the Southern Lights Pipeline would be realized, and to encourage efficient utilization. The toll principles establish a Committed Toll that was just high enough to encourage sufficient subscription for committed service. As a result of this subscription, the Southern Lights Pipeline is now in service and available for Imperial's use.

BP Canada submitted that the Board determines the basis for measuring the justness and reasonableness of tolls. Further, what was decided in the marketplace, and vetted by the Board, should be presumed to be reasonable. The toll structures established and approved for other pipelines are unique to those projects. In accordance with the TSA, ESL must set tolls for the Southern Lights Pipeline based on its cost of service.

BP Canada concluded that the tolls are just and reasonable because they were prepared in accordance with the toll principles approved by the Board. Further, the tolls are cost-based in that they are designed so ESL recovers its revenue requirement. With respect to Imperial's submission about the Rebate Mechanism, BP Canada stated that there is no evidence that the

rebates would materialize. If there are rebates resulting from increased volumes, there would also be increased costs.

Views of SNA

SNA stated that in making its long-term economic commitment to the Southern Lights Pipeline, it relied on the entire suite of interrelated terms and conditions that were made available through the Open Season. Modification of the package or any of the individual elements may well have affected SNA's decision to become a Committed Shipper. SNA submitted that the fairness of the Open Season process remains unchallenged.

5.2 Is the Uncommitted Toll Just and Reasonable?

Views of Imperial

Imperial stated that no evidence was provided during the OH-3-2007 proceeding to substantiate that an Uncommitted Toll which is twice the Committed Toll would result in just and reasonable tolls. Imperial further stated that the Uncommitted Toll is not cost-based.

Ms. Crowe submitted that the 2 to 1 Toll Ratio is significantly in excess of any that could be justified on the basis of risk differentials between Committed and Uncommitted Shippers. She stated that this is particularly true given that there is no difference in the underlying costs of providing uncommitted transportation.

Imperial noted that the Board has traditionally approved uncommitted tolls which reflect premiums ranging from 5 to 20 percent over the corresponding Committed Toll. It also noted that the Board has generally accepted incremental cost and value of service as establishing the respective lower and upper thresholds for interruptible tolls.

Dr. Safir submitted that from an economic standpoint, tolls should fall at or around the cost of service and should run no higher than the avoided cost of alternative service. However, under the terms and conditions of the TSA, the Posted Uncommitted Toll falls far outside this range. Moreover, the Posted Uncommitted Toll will be twice the full-cost-of-service-based toll charged to Committed Shippers. Dr. Safir submitted that this 2 to 1 Toll Ratio is well beyond that charged by other Canadian pipelines, where the highest approved uncommitted premium is about 20 percent.

Dr. Safir added that depending upon the competitive circumstances of the pipeline and the level of service the pipeline will provide, other measures around the cost of service benchmark may be reasonable. For example, where some competition exists, incremental costs are viewed as an appropriate floor. The upper limit, or greatest amount, is what would be charged by others for the same product or service quality. This is obviously the most any customer would be willing to pay the pipeline and forms an avoided cost ceiling.

Imperial submitted that shipping diluent on the Southern Lights Pipeline cannot be said to be economic if the unit cost of transportation exceeds the cost of similar service by alternative means. Imperial asserted that the cost of rail transportation is similar to the sum of Posted Committed Tolls for both the Southern Lights Pipeline and the US Southern Lights Pipeline.

Imperial was of the view that rail is an economic benchmark for regulators to compare against the cost of uncommitted volume service.

Mr. Roman estimated that the current per barrel cost of moving diluent from Chicago to Edmonton by rail is approximately $6.52. However, pipeline social benefits (in terms of lower air pollution, increased safety, less traffic congestion, etc.) are superior to those of rail transmission. Additionally, pipelines are able to transport large volumes of product on a continuous flow basis, consistent with the requirements of oil sands operators.

Dr. Safir concluded that an examination of the different elements of business risk indicates that there is little risk to justify the Uncommitted Toll. In particular, supply risk, market risk, and competitive risk to ESL are all very low.

Imperial stated that in the circumstances of the Southern Lights Pipeline, the multiple benefits conveyed to Committed Shippers under the TSA dictate that only a minimal premium to the Posted Committed Toll can be justified. Imperial noted that Committed Shippers enjoy the benefit of significantly lower tolls; renewal rights; preferred access; the ROFO offer relating to offerings of additional committed capacity and expansion capacity; and preferential treatment resulting from the apportionment provisions of the TSA. In contrast, Uncommitted Shippers are faced with higher tolls; the possibility of interruptible access; and no realistic prospect to subscribe for committed service at any point, including at the end of the initial 15 year term of the TSAs.

Imperial concluded the combined effect of these provisions provides an extraordinary competitive advantage to Committed Shippers which should be reflected by a minimal Uncommitted Toll premium at the lower end of the range (that is, between incremental cost and value of service).

Mr. Johnson described the toll premiums the Board had previously considered for five pipelines. He noted that the premiums for uncommitted tolls for these pipelines ranged from negative 3.8 percent to 20 percent. Mr. Johnson asserted that the premium for uncommitted volumes on the Southern Lights Pipeline greatly exceeds the premiums in the other cases.

Imperial recommended an Uncommitted Toll premium of 20 percent to recognize that the Committed Shippers have accepted responsibility for the cost of service and that Committed Shippers have certain additional benefits. In Imperial's view, such a premium will maximize utilization of the Southern Lights Pipeline, which is consistent with the public interest.

Views of ESL

ESL stated that the Board approved the toll principles in the TSA as just and reasonable in its OH-3-2007 Reasons for Decision. It further noted that the approved toll principles included the method for calculating the Uncommitted Toll.

Given the specific dependence of the economics of the Southern Lights Pipeline on production decisions of Alberta heavy oil producers, ESL determined that it could not have undertaken the Project unless potential shippers, who were in the best position to evaluate the risks, were willing to assume the risks by committing to the Southern Lights Pipeline. If no committed capacity had

been subscribed, the Project would not have proceeded. In Dr. Jaffe's view, given that only 12 234 m^3/d (77,000 b/d) was ultimately subscribed by Committed Shippers, the Southern Lights Pipeline would likely not have been built at its existing capacity had it been a greenfield pipeline. The large excess of uncommitted capacity is the result of the Southern Lights Pipeline project having been executed via the reversal of an existing pipeline. The quantity of uncommitted capacity was greater than the total committed capacity. Therefore, it was more important than usual to the Committed Shippers that the deal they were getting by becoming Committed Shippers (and taking on the commitments necessary to the financing of the pipeline) was superior to the alternative of sitting back and letting someone else take that risk, while counting on the ability to ship at uncommitted rates. Dr. Jaffe submitted that in light of the unusual specifics of this case, the fact that other pipelines do not have a 2 to 1 Toll Ratio is irrelevant.

ESL noted that on the Southern Lights Pipeline, committed volumes and uncommitted volumes are transported under different circumstances and conditions. ESL also noted that the obligations and risks undertaken by Committed Shippers and by Uncommitted Shippers are different.

ESL submitted that the cost of transporting diluent by rail is not a meaningful benchmark for comparing the Uncommitted Toll. From a narrow *ex post* perspective, it might be relevant because it could relate to maximizing the utilization of the pipeline; however, in ESL's view, the overriding consideration should be to preserve the economic framework that allowed the Project to proceed. If it does turn out that this results in an Uncommitted Toll above the cost of rail transportation, that is not material to the consideration of the ESL Toll.

Views of BP Canada

In BP Canada's view, the difference between the Committed Toll and Uncommitted Toll recognizes the different contributions shippers made to the pipeline. BP Canada stated that each case should be evaluated on its own merits. In this case, the financial obligations of the Southern Lights Pipeline were designed with the premise that Committed Shippers would bear certain risks and obligations. The Toll Ratio should compensate Committed Shippers for the risks and obligations they assumed. If the Toll Ratio had been less than 2 to 1, the Southern Lights Pipeline project would not have proceeded.

BP Canada also stated that Committed Shippers made the long term financial commitments and accepted the risks required to support the Southern Lights Pipeline on the basis of a 2 to 1 Toll Ratio. It submitted that after the third shipper exercised its termination rights, the Southern Lights Pipeline was only marginally supported by two Committed Shippers with commitments totaling 12 234 m^3/d (77,000 b/d), equating to just 43 percent of the pipeline's available capacity, yet responsible for the full revenue requirement. BP Canada concluded that, due in material part to the 2 to 1 Toll Ratio, remaining a Committed Shipper on the pipeline remained a viable investment after the third shipper exited. According to BP Canada, the market environment in which the Southern Lights Pipeline evolved was unique in concept, unique in time and unique in terms of the product to be shipped and marketed. These unique risks drove the market to demand a higher rate differential than in other projects.

On behalf of BP Canada, Mr. O'Loughlin stated that the 2 to 1 Toll Ratio is justified by risk differentials and market conditions, and is just and reasonable. Mr. O'Loughlin provided an

analysis of the cost associated with the utilization risk borne by the Committed Shippers. He noted that Committed Shippers have contracted for 43 percent of pipeline capacity. His calculations indicated that if Committed Shippers paid 43 percent of the pipeline's revenue requirement over the term of their 15 year contracts, they would pay a present value cost of approximately $333.7 million. Mr. O'Loughlin also calculated that with the current 2 to 1 Toll Ratio, the Committed Shippers will pay a present value cost of approximately $309.1 million over the term of their 15 year contracts. Mr. O'Loughlin concluded that these costs are not dissimilar.

Mr. O'Loughlin noted that while the Committed Shippers face several different types of risks (for example, the level and timing of Alberta Oil Sands development, the Southern Lights Pipeline construction cost, diluent supply risk and competition in the diluent market), most of these risks ultimately manifest themselves as underutilization risk on the pipeline. He submitted that the substantial underutilization risk the Committed Shippers are bearing reasonably justifies the 100 percent toll premium for uncommitted shipments.

BP Canada submitted that it and other Committed Shippers would:

- bear the regulatory risks of Project approval;
- bear the risk of paying capital cost overruns and providing payment guarantees for such costs;
- bear the risk of no or limited demand in Alberta for the diluent transported by the Southern Lights Pipeline;
- be required to fulfill an obligation to ship (or pay for) a minimum committed volume each month for 15 years, thus providing the assured revenues necessary to permit financing of the pipeline;
- execute the guarantees required to secure the obligations to make these future financial payments; and
- expend substantial resources to source and supply the required linefill at a cost of $US 239.8 million.

On behalf of BP Canada, Dr. Church stated that if the 1.5 to 1 Toll Ratio were sufficient to compensate potential shippers for the perceived risk of committing long term, then others, including Imperial, would have come forward and there would have been no need for an extended Open Season. The obligations associated with the Committed Shippers making a commitment to cover costs for 15 years undoubtedly resulted in more favourable finance terms for the pipeline.

Dr. Church asserted that there were no barriers to entry to participation in the Open Seasons. Any potential shipper could have participated on the same terms as the Committed Shippers. All potential shippers were in a position to evaluate the costs and benefits of becoming a Committed Shipper.

BP Canada noted that Committed Shippers shipped approximately 54 percent of their committed volumes from 1 July 2010 to 31 January 2011, resulting in average payment of $22.48 per m^3. It

noted that this is only modestly below the Posted Uncommitted Toll of $24.272 per m^3. BP Canada argued that if it is just and reasonable for the Committed Shippers to pay those higher rates, Uncommitted Shippers should pay at least the same approximate toll.

BP Canada submitted that the toll principles provide for tolls to be established on a full cost of service basis. Based on current forecasts, by 2013 the Uncommitted Toll will be roughly equal to the rail rate calculated by Mr. Roman. By 2014, the Uncommitted Toll will be below the rail rate. Finally, BP Canada stated that to the extent the pipeline is expected to fill up by 2015, the Uncommitted Toll will drop dramatically.

Views of SNA

SNA noted that the TSA provided SNA the opportunity to exit the Project or to increase SNA's committed volume after the third Committed Shipper exercised its no-cause termination right. Despite an increase in the estimated Committed Toll, SNA elected to remain as a Committed Shipper because the 2 to 1 Toll Ratio would continue to ensure competitive Committed and Uncommitted Tolls compared to any known alternative (that is, truck and railcar transportation).

5.3 Is the Uncommitted Toll Unjustly Discriminatory?

Views of Imperial

Imperial recognized that pipelines which provide both committed and uncommitted service generally discriminate in some manner. However, Imperial submitted that the package of rights granted to Committed Shippers under the TSA is without precedent and generally discriminates against Uncommitted Shippers. Additionally, the toll principles create unique discrimination because the marginal toll for uncommitted service is different for Committed and Uncommitted Shippers. In Imperial's view, this creates a competitive advantage for Committed Shippers.

Imperial asserted that ESL set the 2 to 1 Toll Ratio based on the advice received from potential shippers. It was also of the view that ESL's evidence failed to demonstrate that the ESL Toll and Tariffs are not unduly discriminatory.

Views of ESL

ESL submitted that committed and uncommitted volumes are transported under different circumstances and conditions, and that the obligations and risks undertaken by Committed Shippers and by Uncommitted Shippers are different. Consequently, charging Committed Shippers and Uncommitted Shippers different tolls is not unjustly discriminatory within the meaning of section 67 of the NEB Act.

Views of BP Canada

BP Canada submitted that the mere existence of different tolls does not render such tolls unjustly discriminatory where the tolls charged are in respect of traffic transported under differing circumstances and conditions. The ESL toll methodology was established through an Open Season process in which all potential shippers, including Imperial, had the opportunity to participate. It noted that no unfairness or complaint has been raised with respect to this process.

In response to Imperial's argument regarding unique discrimination due to the marginal toll, Dr. Church analyzed the incentives to ship a marginal uncommitted barrel. He examined the net effect of shipping uncommitted volumes for a Committed Shipper and an Uncommitted Shipper. He concluded the benefits from uncommitted volumes would be identical for each shipper. In Dr. Church's view, having identical benefits could not result in Committed Shippers having a competitive advantage when shipping uncommitted volumes.

Views of SNA

SNA submitted that there was no unjust discrimination as the entire suite of interrelated terms and conditions of service were made available to all parties through the Open Season process. SNA further submitted that the fairness of the Open Season process remains unchallenged.

Views of the Board

The Board has examined Imperial's submission that the elements of ESL's cost of service significantly overstate the actual costs incurred as well as Imperial's corresponding request for the Adjustments. The Board has also examined the supporting information provided by ESL, ESL's evidence in support of its argument that there is no basis for the Adjustments, and all other intervenor submissions. With respect to Imperial's requests for the Adjustments, the Board denies the requests. The Board is of the view that ESL has provided a reasonable explanation as to why the Adjustments are neither warranted nor appropriate.

The Board is satisfied that the evidence filed by ESL demonstrates the Committed Toll is cost-based and has been calculated in a reasonable manner. While the Board recognizes that the capital cost provided by ESL during the course of this proceeding was higher than the amount estimated during the OH-3-2007 proceeding, the Board is of the view that ESL has provided a reasonable explanation for this difference, namely the higher engineering and construction costs attributable to the then overheated market. Given the above, the Board is of the view that the Committed Toll is just and reasonable.

The Board has also considered Imperial's request that the Board order ESL to calculate the Posted Toll on a cost of service basis less a reasonable forecast of Uncommitted Toll revenue. The Board denies Imperial's request. As discussed in Chapter 7 of these Reasons for Decision, the Board also denies Imperial's request to establish a deferral account. The Board is not persuaded that the Rebate Mechanism results in any more uncertainty for Uncommitted Shippers than would the deferral account which has been proposed by Imperial. In the Board's view, the Rebate Mechanism creates minimal risk of any intergenerational inequity. In addition, given that there are a small number of shippers on the pipeline and that only one product flows through the line, the Board is of the view that the Rebate Mechanism would be relatively straightforward to

administer. The Board has considered Imperial's request based on the submissions before it and in the context of whether the toll principles lead to just and reasonable tolls. The Board notes that because there was no uncommitted revenue, this request does not relate to the tolls which are the subject of this proceeding. For further discussion on the deferral account proposed by Imperial, see Chapter 7 of these Reasons for Decision.

With respect to the Uncommitted Toll, the Board is not persuaded by Imperial's request to impose a premium of no more than 20 percent for uncommitted service, or a Toll Ratio of 1.2 to 1. The Board notes the five Board decisions referred to by Imperial in support of its request. In the Board's view, this case differs from these decisions.

The Southern Lights Pipeline is the result of the reversal of an existing pipeline with a capacity of 28 617 m^3/d (180,000 b/d). Despite the size of the pipeline, it was only supported by committed contracts totaling 12 234 m^3/d (77,000 b/d), or 43 percent of the pipeline's capacity. Consequently, there is a large excess of capacity on the pipeline. The Board notes Dr. Jaffe's submission that given the level of committed volumes, the Southern Lights Pipeline would likely not have been built at its existing capacity had it been a greenfield pipeline. Even though only 43 percent of the pipeline's capacity had been subscribed, Committed Shippers agreed to finance the pipeline by paying the full revenue requirement for the first 15 years. Therefore, the Board is of the view that the Committed Shippers took on substantial underutilization risk and did so based on all aspects of the toll principles, including the 2 to 1 Toll Ratio.

In addition, the Board finds that Committed Shippers have also taken on risk related to the nature of the diluent market. As discussed in Chapter 6 of these Reasons for Decision, the Board is of the view that demand for diluent transportation on the Southern Lights Pipeline has not fully developed. The Southern Lights Pipeline is the first import diluent pipeline in Canada. Therefore, although shippers contracting for volumes on the pipeline during the Open Seasons were aware of their own diluent needs, they would have had no certainty as to whether other shippers would use the line.

Despite these risks, certain shippers committed to volumes as a result of the 2006 and 2007 Open Seasons. The Board notes that all potential shippers had the opportunity to participate in the Open Seasons. In the OH-3-2007 Reasons for Decision, the Board concluded that the Open Seasons granted all potential shippers a fair and equal opportunity to participate. No party to the RH-1-2011 proceeding disputed this finding.

The Board further notes that during the Open Season process, the market determined the terms and conditions of the TSA, including the 2 to 1 Toll

Ratio, that would enable the development and operation of the Southern Lights Pipeline. The TSA and toll principles set out the benefits of shipping committed volumes, for example, the 2 to 1 Toll Ratio. They also set out risks, for example the responsibility of Committed Shippers for the entire revenue requirement of the pipeline as described above, and for line fill. The TSA and toll principles did not require Uncommitted Shippers to take on such risks. All interested persons had an opportunity to test or challenge the toll principles in the OH-3-2007 proceeding. However, neither Imperial nor any other party opposed the toll principles or expressed concerns about them.

The Board approved the toll principles in its OH-3-2007 Reasons for Decision, issued February 2008. Subsequently ESL and its Committed Shippers decided to move ahead with the Southern Lights Pipeline project as approved by the Board. Tariffs 1 and 2 were filed in May 2010, Imperial filed a complaint, and the RH-1-2011 hearing process continued throughout 2011. In the Board's view, the market for diluent and the obligations of Committed Shippers as described in the TSA and toll principles have not changed significantly as these events have unfolded.

Taking into account all the factors above, particularly the unique context in which the Southern Lights Pipeline developed, the nature of the diluent market, the risks taken on by Committed Shippers, the Committed Shippers' responsibility for the pipeline's revenue requirement over 15 years and the impacts on the parties of any change, the Board is of the view that a 2 to 1 Toll Ratio is just and reasonable. The Board notes Imperial's submission regarding past decisions which outline generally accepted lower and upper thresholds for interruptible tolls. While past Board decisions provide guidance, the Board has determined that the Uncommitted Toll is just and reasonable based on the specific circumstances of this case.

The Board notes Imperial's argument that the toll principles create unique discrimination for uncommitted service because the marginal toll is different for different shippers. The Board does not agree. The Board finds that all shippers, whether committed or uncommitted, pay the same toll for uncommitted service. For the reasons above, the Board concludes that the Uncommitted Toll is not unjustly discriminatory.

With respect to apportionment, Imperial noted that committed service is the last to be apportioned if the Southern Lights Pipeline is oversubscribed. In the Board's view, it is reasonable that Committed Shippers be the last to be apportioned.

The Board notes the written evidence provided by Mr. O'Loughlin. In the Board's view, this evidence illustrates the type of analysis a prospective shipper could have undertaken, based on an assumed throughput level, to

determine the relative value of committed versus uncommitted service when making contracting decisions. Using this type of analysis, a prospective shipper could reasonably draw the conclusion that the 2 to 1 Toll Ratio in this case would result in a Committed Shipper paying approximately its proportionate share (capacity-wise) of the pipeline costs over the life of the shipper's contract. The analysis provided supports the view that the 2 to 1 Toll Ratio is not unreasonable.

The Board is not persuaded in this case that rail transportation is an appropriate comparison to pipeline transportation. The Board has determined that the Committed Toll is cost-based because it is based on the Southern Lights Pipeline's revenue requirement and throughput. In the Board's view, having regard to the circumstances of this case, an Uncommitted Toll based on a 2 to 1 ratio with respect to the Committed Toll, rather than based on the cost of alternative forms of transportation, is reasonable.

Chapter 6

Is The Uncommitted Toll An Impediment?

6.1 Level of the Uncommitted Toll

Views of Imperial

Imperial noted that Uncommitted Shippers have yet to transport any volumes on the Southern Lights Pipeline. In Imperial's view, this is likely due to the lower cost of rail transportation when compared to the current ESL Toll at low pipeline utilization, and that the Uncommitted Toll is an impediment to its use. In addition, according to Imperial, there have been multiple versions of the TSA and toll principles, and it was unclear which version was operative. Imperial also submitted that it was unclear whether the Rebate Mechanism was calculated on a revenue or volume basis. Finally, Imperial was of the view that due to the operation of the Rebate Mechanism and the nomination procedure for Uncommitted Shippers in Tariff 1, it was difficult for prospective shippers to correctly predict the Effective Tolls on the Southern Lights Pipeline. In Imperial's view, such ambiguities also resulted in an impediment to access.

Views of ESL

ESL submitted that Uncommitted Shippers have yet to transport any volumes on the Southern Lights Pipeline because there was no market need for these volumes. In ESL's view, this lack of market need was demonstrated by the underutilization of committed capacity.

ESL argued that the multiple versions of documents did not make the toll principles unclear. The TSA and the supplemental letter agreement between ESLLP and Committed Shippers were filed with the Board during the OH-3-2007 proceeding. Therefore, the Board was made aware, when it approved the toll principles that the Rebate Mechanism would be applied so as to maintain the 2 to 1 Toll Ratio.

Views of BP Canada

BP Canada submitted that Imperial provided no evidence showing that it attempted to nominate volumes to the Southern Lights Pipeline or that it was not granted reasonable access. It noted that approximately 57 percent of the pipeline capacity is open and available for uncommitted shipments. Furthermore, Committed Shippers only shipped approximately 54 percent of their committed volumes in the first seven months of operation.

In BP Canada's view, the demand for diluent in Alberta is a derived demand, largely dependent on the level of Alberta oil sands production. It submitted that the demand for diluent from the Southern Lights Pipeline has not yet developed. This is supported by the fact that Committed Shippers can currently transport diluent at a marginal cost of zero, and yet there is still unused committed capacity. As there has not been sufficient demand on the Southern Lights Pipeline to

satisfy committed volume, lowering the Uncommitted Toll would have a marginal impact on demand for the volume of diluent shipped on the Southern Lights Pipeline.

BP Canada stated that conceptually, the demand curve for diluent is downward sloping; that is, a lower price results in greater demand. In addition, the demand for diluent comes in large chunks, with magnitudes in the tens of thousands of barrels a day. Only when large oil sands projects become operational and increase the net demand for diluent in Alberta will the volumes transported significantly increase. This will result in a corresponding decrease in the Effective Uncommitted Toll.

BP Canada argued that the record was abundantly clear that the Rebate Mechanism is to be determined on a revenue basis. In addition, BP Canada stated that there were no barriers to participating in the Open Seasons for the Southern Lights Pipeline. Any potential shipper could have participated on the same terms as the Committed Shippers.

Views of SNA

SNA considered the Imperial complaint to be premature. It submitted that the Southern Lights Pipeline has been in operation for a short period and that the demand has not yet materialized. When the demand appears and the throughput increases, the Effective Committed and Uncommitted Tolls will decrease. Therefore, SNA was of the view that there is no impediment for Uncommitted Shippers to use the pipeline.

6.2 Monopoly Power

Views of Imperial

Imperial submitted that the possible alternatives to the Southern Lights Pipeline are: transportation by rail; Alberta-sourced diluent; upgrading the bitumen before transporting it; or transportation on the proposed Northern Gateway pipeline project. In Imperial's view, none of these options are competitive alternatives.

Imperial further submitted that the Southern Lights Pipeline is currently the only pipeline available for shipping diluent from the US Midwest to Edmonton. Therefore, given the projected increased requirements of the Canadian bitumen market, there are no viable long term alternatives to the Southern Lights Pipeline. As a result, the Southern Lights Pipeline is a monopoly pipeline providing a required service for Canadian bitumen producers. Imperial concluded that regulation is necessary to prevent the exercise of monopoly power.

In Imperial's view, rail is not a suitable competitive alternative to pipeline. Imperial stated that a primary advantage of a pipeline is that it has a low variable cost for moving diluent, a much lower variable cost than rail or truck transportation. This natural cost advantage gives the Southern Lights Pipeline the theoretical ability to price rail out of the marketplace.

Imperial submitted that the absolute and relative cost of shipping uncommitted volumes on the Southern Lights Pipeline has been inflated as a result of the pipeline's monopoly control of diluent transportation. This inflated cost has resulted in an unreasonable impediment to the

shipment of uncommitted volumes and hence for potential Uncommitted Shippers to become market participants.

Views of BP Canada

BP Canada stated that the Southern Lights Pipeline is a new supply source of diluent for Alberta. Imperial and all others who require diluent in Alberta are able to source diluent from local production and diluent imported by other means, such as truck and rail. These alternative sources of diluent impact the demand for imported diluent in Alberta and contribute to the demand risk associated with the Southern Lights Pipeline.

BP Canada submitted that the demand for diluent from the Southern Lights Pipeline is a derived demand, and that its market power depends on the ability of buyers to substitute alternate diluent sources. Only if these substitution possibilities are sufficiently limited will the Southern Lights Pipeline be able to exercise market power; that is, raise the price of transportation above competitive levels. Otherwise, the availability of sufficient alternatives will thwart the exercise of market power by the Southern Lights Pipeline.

Given the realities of diluent demand, BP Canada urged caution against recommendations to mandate pipeline tolling at levels below competitive alternatives. Such recommendations are in essence, recommendations that the Board render the competing rail and truck alternatives unviable. In BP Canada's view, it is not a reasonable objective for the Board to determine which transportation alternatives should be the competitive winners and the losers.

BP Canada noted that a diluent market existed before the Southern Lights Pipeline was put in place. In order for ESL and the Committed Shippers to attract business, the Southern Lights Pipeline must provide service that is at least competitive with the alternatives that existed before the pipeline went into service. BP Canada submitted that the differential between rail and the Committed and Uncommitted Tolls indicates that rail is in fact a competitive alternative available to potential shippers of diluent. The Southern Lights Pipeline is not currently a monopoly supplier of diluent in Alberta and likely has very little market power.

6.3 The Right of First Offer

Views of Imperial

Imperial requested that the Board strike section 6.06 from the TSA. Imperial stated that the ROFO was discriminatory and anti-competitive. If ESL offered available capacity, there would be no incremental cost to any Committed Shipper to sign up for the additional capacity. If Committed Shippers were to exercise their rights under section 6.06 to obtain the capacity, other potential shippers could be denied access to committed service on the Southern Lights Pipeline for the expected lifetime of the pipeline. In this case, Uncommitted Shippers would be required to use uncommitted service or to negotiate with Committed Shippers to acquire any of their unused committed capacity. Presumably, Committed Shippers would set the price at whatever the market would bear. Because the pricing of the services would be dictated by Committed Shippers, it would fall outside of the purview of the Board. Thus, in Imperial's view, the effect of the ROFO provision is to grant almost complete market power to the existing Committed

Shippers on the Southern Lights Pipeline. Further, the Committed Shippers would enjoy near monopoly control of the entire Southern Lights Pipeline.

Imperial submitted that these effects create a barrier to entry and result in significant competitive advantages for Committed Shippers. Thus, in its view, the ROFO is an unreasonable impediment to potential Uncommitted Shippers which obstructs Uncommitted Shippers' participation in the market. It further submitted that the impact of this provision on potential shippers is directly related to the differential between the Committed and Uncommitted Tolls - the greater the difference in tolls, the worse the impact on Uncommitted Shippers.

Views of ESL

ESL stated that it would be premature to consider Imperial's request to strike section 6.06, since Imperial has not requested nor been denied access to the Southern Lights Pipeline. ESL submitted that the rights under the ROFO are a reasonable component of the reward to the Committed Shippers for making the commitments necessary to finance the Southern Lights Pipeline. In ESL's view, Imperial wants the benefits of being a Committed Shipper while having avoided the costs.

Views of BP Canada

In BP Canada's view, the ROFO was part of the package of benefits it considered when it undertook to become a Committed Shipper.

BP Canada stated that actual volumes shipped to date on the Southern Lights Pipeline have been materially less than the contracted committed volumes. It noted that Imperial has not sought or attempted to ship any volume on the Southern Lights Pipeline. Furthermore, no Uncommitted Shippers have shipped uncommitted volumes. Therefore, concerns that future shippers could be denied access to the Southern Lights Pipeline are premature.

BP Canada submitted that while the ROFO provision makes it possible for Committed Shippers to acquire up to 25 755 m^3/d (162,000 b/d), it is not clear that they would have the incentive to do so, or that acquiring this capacity would have anticompetitive effects. In its view, market discipline would make such anticompetitive efforts futile.

Views of SNA

SNA stated that although it could have exercised the ROFO in the past, SNA declined to contract for additional capacity. It indicated that if there were future capacity expansions, its own decision regarding whether to exercise the ROFO would be dictated by its internal needs for additional diluent supply. SNA was further of the view that the TSA, including the ROFO, should be viewed as one package and that no provision should be changed retroactively.

Views of the Board

The Board accepts the evidence presented by the parties that the demand for diluent in western Canada is a derived demand, dependant on oil sands production. The Board notes that the Southern Lights Pipeline was underutilized in 2010. The Board also notes that Committed Shippers did not ship their full committed volumes, despite the fact that the marginal cost to do so would have been zero. Given the above, the Board is of the view that market demand for diluent transportation on the Southern Lights Pipeline has not fully developed.

The Board is further of the view that there are other means than the Southern Lights Pipeline to obtain diluent for the Alberta market. Therefore, the Board is not persuaded that ESL is a monopoly pipeline exerting monopoly power in the diluent market. In the Board's view, a competitive market for diluent is operating in western Canada at the present time.

The Board has considered Imperial's submissions that the confusion surrounding the multiple versions of the TSA and toll principles, the ambiguity associated with Rebate Mechanism in Schedule B of the TSA, and the operation of Tariff 1 all resulted in an impediment to access. In the Board's view, Tariffs 1 and 2 clearly indicate the manner in which the ESL Toll and the Rebate Mechanism are to be calculated. The Board also accepts ESL's explanation that it updated the Rebate Mechanism in 2007 to maintain the 2 to 1 Toll Ratio in accordance with the toll principles which were approved by the Board in the OH-3-2007 Reasons for Decision. In addition, Imperial provided no evidence that it or any other person has tried but was unable to gain access to the Southern Lights Pipeline as a result these factors. If Imperial was of the view that such ambiguities were an impediment, the Board would have expected that Imperial would have sought clarification from ESL. Notwithstanding this expectation, the Board is not persuaded that the factors identified above have resulted in an impediment to access.

Finally, the Board has considered parties' submissions regarding the ROFO. As previously stated, the volumes shipped on the Southern Lights Pipeline to date have been less than the volumes contracted. In addition, no Committed Shipper has exercised the ROFO and no potential shipper, including Imperial, has sought and been denied committed service as a result of the ROFO. Therefore, in the Board's view, Imperial's request to strike the ROFO is premature. Accordingly, the Board denies Imperial's request to strike section 6.06 of the TSA.

For the above reasons, the Board finds that there is no evidence that the Uncommitted Toll is, at this point in time, an impediment to access.

Chapter 7

Other Requested Relief

7.1 Creation of a Deferral Account

Imperial requested that the Board direct ESL to establish a deferral account to record:

1. the variance between the forecast and actual revenue received;

2. the variance between forecast and actual operating costs; and

3. carrying charges based on ESL's weighted average cost of capital on a monthly balance, which charges are to be continued until amortization of the deferral account.

Imperial further requested that the Board direct ESL to credit or debit the amount in the deferral account into the subsequent year's revenue requirement. Imperial was of the view that the current Rebate Mechanism has the effect of providing ESL an interest-free loan from shippers.

ESL and BP Canada stated that Imperial's proposal could potentially result in intergenerational inequities because there could be different shippers on the pipeline in each year. ESL was also of the view that the deferral account was not contemplated in the TSA.

Views of the Board

In the Board's view, the current provisions of the TSA, which allow ESL to refund or recover the variances between the actual and forecasted revenue requirement, are appropriate for the Southern Lights Pipeline. These provisions limit the possibility of intergenerational inequities, and allow shippers to receive refunds sooner than the deferral account suggested by Imperial. Moreover, none of the current shippers expressed support for Imperial's position, or made similar requests for a deferral account.

Given the above reasons, the Board finds that Imperial's request to establish a deferral account is not warranted. For further discussion in respect of Imperial's request that the Board order ESL to calculate the Posted Toll on a cost of service basis less a reasonable forecast of Uncommitted Toll revenue, see Chapter 5.

7.2 Section 15 of the Toll Principles

Imperial requested that the Board strike section 15 of the toll principles.[6] This section relates to the carrier incentive when throughput volume exceeds 25 755 m^3/d (162,000 b/d). In its view, 25 percent of uncommitted revenue was not justified given that it could result in a return on equity to ESL of 20.36 percent.

ESL stated that this carrier incentive was negotiated by ESL during the give and take process with Committed Shippers and that it is one of the toll principles approved by the Board in the OH-3-2007 Reasons for Decision.

Views of the Board

The Board notes that the carrier incentive was part of a package deal between ESL and its shippers and the toll principles that were approved by the Board in the OH-3-2007 Reasons for Decision. In the Board's view, Imperial did not provide a convincing argument as to why this provision should be revisited; neither did it request a review of this decision. Further, the purpose of this proceeding was to consider matters related to tolls filed with the Board. Given that no uncommitted revenue has yet been earned under section 15, the Board is of the view that this request, as it relates to the purpose of this proceeding, is not relevant.

6 Section 15 of the toll principles in Schedule B to the TSA entitles ESL to 25 percent of the revenue for uncommitted volumes shipped over 25 755 m^3/d (162,000 b/d).

Chapter 8

The Board's Views on Related Matters

8.1 Financial Regulation of Group 2 Companies

General Principles

During this proceeding some parties made statements about the regulatory differences between Group 1 and Group 2 companies.

In accordance with the OPUAR, all oil pipeline companies under the Board's jurisdiction that are not designated as Group 1 are considered to be Group 2 companies for financial regulatory purposes. Companies may be designated as Group 1 either in the OPUAR or by direction of the Board.

A company that is new to the Board's jurisdiction may request a decision from the Board as to whether it will be financially regulated as Group 1 or Group 2. Such requests are commonly made in conjunction with an application for the construction and operation of a new pipeline pursuant to Part III of the NEB Act. If the Board approves the pipeline application, the Board will also consider whether to designate the company as Group 1 or Group 2. Therefore, a company new to the Board's jurisdiction seeking approvals pursuant to Part III and Part IV of the NEB Act should submit all documents relevant to its requests during the course of the proceeding set down to hear its application. Similarly, the Board expects that all persons with a potential interest in the financial regulatory requirements of the new company will participate and bring forward any known concerns during the proceeding.

All Group 1 and Group 2 companies must comply with Part IV of the NEB Act. Group 2 companies have fewer financial regulatory requirements than Group 1 companies under the OPUAR and the *Toll Information Regulations*. However, the Board may impose additional regulatory requirements on a company whether it is designated as Group 1 or Group 2.

Group 2 companies are generally regulated on a complaint basis. That is, a toll in a tariff filed by a Group 2 company automatically becomes operational as of its effective date, once it is filed with the Board. While Group 2 companies are regulated on a complaint basis, an interested person may file a toll or tariff complaint with respect to any company under the Board's jurisdiction whether the company is designated Group 1 or Group 2. If a complaint is filed, the Board may establish a procedure to examine the toll. In addition, the Board may decide to examine a tariff or toll at any point in the life of a pipeline following receipt of an application under Part IV of the NEB Act, or on its own initiative, regardless of whether the company has Group 1 or Group 2 status.

Financial Regulation of ESL as a Group 2 Company

ESL, on behalf of ESLLP, requested and was granted status as a Group 2 company during the course of the OH-3-2007 proceeding. Therefore, in addition to complying with Part IV of the NEB Act, ESL must also comply with the requirements for all Group 2 companies as described in the OPUAR and the Board's 9 November 2009 letter regarding the financial regulation of pipeline companies under its jurisdiction.[7] These requirements include providing shippers and interested persons with sufficient information to enable them to determine whether a complaint is warranted. ESL must also comply with the additional requirements that the Board imposed in the OH-3-2007 Reasons for Decision.

The Board notes that ESL did not submit supporting documents with Tariff 2, which set the Posted Tolls for 2010. The submission of supporting documentation for toll filings is one of the additional requirements imposed by the Board in the OH-3-2007 Reasons for Decision. The Board expects ESL to comply with this requirement for all toll filings made subsequently to Tariff 2.

8.2 Regulatory Certainty

General Principles

During this proceeding, parties raised the issue of the appropriate timing for bringing forward concerns about tolls and toll principles, and the potential impact of that timing on regulatory certainty.

The Board strives for regulatory certainty. The Board considers the need for regulatory certainty to be an important factor in its decision-making process with respect to toll and tariff matters. The Board previously recognized its role of providing regulatory certainty in a letter issued during the course of the RH-1-2007 proceeding. In this letter the Board stated that:

> ...it has a role to enable the responsible development of Canada's energy sector for the benefit of Canadians. Part of this role involves providing stakeholders with regulatory certainty with respect to toll methodology.

Although this statement was made in the context of a rate hearing, the Board is of the view that it also applies in proceedings where project proponents seek both Part III approvals for facilities and associated Part IV approvals.

When a project proponent applies for approvals under both Parts III and IV of the NEB Act, it typically files illustrative tolls. During the proceeding to consider such approvals, the actual capital costs, financing terms and future pipeline utilization levels may be unknown. In addition, the value of potential future benefits, such as contract renewal rights and the right of first offer, may be difficult to ascertain. Accordingly, the discussion of toll principles will be largely hypothetical. Nevertheless, the Board has a role to play in enabling responsible development of Canada's energy sector. As part of this role, the Board endeavors to ensure that its regulatory

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7 The 9 November letter (NEB Regulatory Document A23677) is entitled Memorandum of Guidance - Financial Regulation of Pipeline Companies under the Board's Jurisdiction.

processes considering these approvals are as efficient and effective as possible for all participants. Therefore, the Board expects that any person with a potential interest in toll and tariff principles will participate when they are first presented to the Board for approval. In this way, the Board can consider all relevant concerns brought forward, including general concerns relating to the operation of the toll principles throughout the life of the pipeline.

The Board is aware that the marketplace continues to evolve over time and that changing circumstances could result in a request for toll or tariff changes subsequent to an initial approval. The Board is of the view that any differences of opinion that may arise in respect of proposed changes can best be resolved through mutual discussion and negotiation among all persons with an interest in the outcome. The Board expects that all interested persons will work diligently to reach agreement. However, should agreement not be reached, persons with outstanding issues have the option to seek resolution by the Board.

The Board has an ongoing obligation to make sure that tolls are just and reasonable throughout the life of a pipeline. Further, previous decisions made by the Board, including those concerning toll principles, do not have the effect of binding the Board in future determinations. Nevertheless, the Board is mindful of the fact that once toll principles are approved, the project proponent and Committed Shippers rely on the approved principles to make investment decisions.

The Role of Regulatory Certainty in the RH-1-2011 Proceeding

The Board heard evidence in this proceeding that BP Canada, SNA and Imperial all had reason to believe that they might require service on the Southern Lights Pipeline at some point prior to the OH-3-2007 proceeding. BP Canada and SNA became Committed Shippers. Imperial had discussions with ESL about obtaining service on the Southern Lights Pipeline, but did not become a Committed Shipper. The TSA and toll principles were submitted for the Board's consideration during the course of the OH-3-2007 proceeding. Imperial was aware of this proceeding but elected not to raise concerns about the toll principles with the Board at that time.

The Board is of the view that Imperial could have raised its concerns during the OH-3-2007 proceeding. As previously stated, the Board expects any interested person, including those who have potential concerns about the toll principles associated with a project, to participate when the toll principles are first presented to the Board for approval.

The Board must consider the impact any change to the approved toll principles will have on shippers who have made substantial investments in the pipeline based on those principles. Accordingly, the Board, when considering the issues in this proceeding, has placed substantial weight on the impacts on ESL, BP Canada and SNA if the TSA and toll principles were altered as suggested by Imperial.

8.3 Future Requests for Committed Service on the Southern Lights Pipeline

As stated in Chapter 6 of this Reasons for Decision, the Board is of the view that demand for service on the Southern Lights Pipeline has not yet developed. However, the Board agrees with the general expectation by all parties that the market demand in western Canada for diluent will increase as new bitumen projects come on stream. As a result, nominations to transport diluent on the Southern Lights Pipeline could increase substantially over the next few years.

The Board is mindful that Imperial is not a shipper at this time nor has it formally requested access on the Southern Lights Pipeline. Should Imperial or any other person seek committed capacity and be denied, it could at that time request relief from the Board. However before doing so, all efforts to negotiate reasonable terms and conditions appropriate for the circumstances at the time should be exhausted.

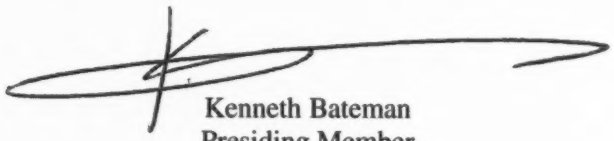
Chapter 9

Disposition

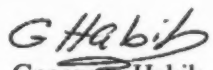
The foregoing constitutes the Board's Reasons for Decision in respect of Tariffs 1 and 2 and the relief requested by Imperial.

The Board approves Tariffs 1 and 2 as filed, and has issued Toll Order TO-02-2010 to this effect. A copy of the Order is attached as Appendix V.

The Board denies the relief requested by Imperial.



Kenneth Bateman
Presiding Member



Georgette Habib
Member

Lyne Mercier
Member

January 2012
Calgary, Alberta

Appendix I

Interim Toll Orders

ORDER TOI-05-2010

IN THE MATTER OF the *National Energy Board Act* and the regulations made thereunder; and

IN THE MATTER OF a Complaint by Imperial Oil (Imperial) dated 1 September 2010 under File OF-Tolls-Group2-E242-TFGen 01 01.

BEFORE the Board on 29 October 2010.

WHEREAS on 31 May 2010 Enbridge Southern Lights GP (ESL) filed Tariffs No. 1 and No. 2 pursuant to section 60(1)(b) of the *National Energy Board Act* for tolls to be effective 1 July 2010;

AND WHEREAS on 1 September 2010 Imperial requested the Board to make the current tolls interim until the Board's determination of whether such tolls are just and reasonable;

AND WHEREAS the Board issued a letter dated 17 September 2010 soliciting comments on the Imperial Complaint;

AND WHEREAS comments were received from BP Canada Energy Company, Husky Energy Marketing Inc. and Statoil North America, Inc., ESL and Imperial;

IT IS ORDERED THAT, pursuant to subsection 19(2) and section 59 of the Act, ESL Tariffs No. 1 and No. 2 are made interim effective 1 November 2010 for all ESL shippers.

NATIONAL ENERGY BOARD

Anne-Marie Erickson
Secretary of the Board

ORDER AO-1-TOI-05-2010

IN THE MATTER OF the *National Energy Board Act* (the Act) and the regulations made thereunder; and

IN THE MATTER OF an application by Enbridge Southern Lights GP on behalf of Enbridge Southern Lights LP (ESL) dated 6 December 2010 for approval of revised interim tolls under subsections 60(1) and 19(2) of the Act, filed with the National Energy Board under File OF-Tolls-Group2-E242-TFGen 01 01.

BEFORE the Board on 29 December 2010.

WHEREAS on 31 May 2010 Enbridge Southern Lights GP (ESL) filed Tariffs No. 1 and No. 2 under paragraph 60(1)(b) of the Act for tolls to be effective 1 July 2010;

AND WHEREAS on 1 September 2010 Imperial Oil requested the Board to make the current tolls interim until the Board's determination of whether such tolls are just and reasonable (Imperial Complaint);

AND WHEREAS the Board issued a letter dated 17 September 2010 soliciting comments on the Imperial Complaint and comments were received from BP Canada Energy Company, Husky Energy Marketing Inc. and Statoil North America, Inc. (Statoil), ESL and Imperial;

AND WHEREAS the Board issued Order TOI-05-2010 on 29 October 2010 which made ESL Tariffs No. 1 and No. 2 interim effective 1 November 2010 for all ESL shippers;

AND WHEREAS on 6 December 2010 ESL filed Tariffs No. 3 and No. 4 under paragraph 60(1)(b) and subsection 19(2) of the Act for revised interim tolls to be effective 1 January 2011;

AND WHEREAS on 16 December 2010 comments were received from Statoil;

AND WHEREAS on 17 December 2010 comments were received from ESL;

THEREFORE, IT IS ORDERED, under subsection 19(2) and section 59 of the Act, that ESL Tariffs No. 3 and No. 4 are made interim effective 1 January 2011 for all ESL shippers until they are replaced by a final order of the Board;

NATIONAL ENERGY BOARD

Anne-Marie Erickson
Secretary of the Board

Appendix II

RH-1-2011 List of Issues

The Board has identified but does not limit itself to the following issues for discussion in the proceeding:

1. Are the committed and uncommitted tolls just and reasonable?

2. Is the uncommitted toll unjustly discriminatory?

3. Is the uncommitted toll an unreasonable impediment to potential uncommitted shippers?

Appendix III

Board Letter Dated 29 April 2011

File OF-Tolls-Group2-E242-2010-01 01

29 April 2011

To: All Parties to Hearing Order RH-1-2011

Hearing Order RH-1-2011 regarding Imperial Oil Complaint
Enbridge Southern Lights GP Inc. Tariffs Nos. 1 and 2
List of Issues and Revision to Timetable of Events

On 28 March 2011, the National Energy Board (Board) issued the RH-1-2011 Hearing Order. This letter concerns the comments and requests for clarification the Board received regarding:

1. the List of Issues in Appendix 1 of the RH-1-2011 Hearing Order;
2. the relationship between the RH-1-2011 proceeding and the Board's OH-3-2007 decision; and
3. the Timetable of Events in Appendix II of the Hearing Order.

1. List of Issues

The Board received submissions on the List of Issues from BP Canada Energy Company (BP Canada), Statoil North America, Inc. (Statoil), Imperial Oil (Imperial) and Enbridge Southern Lights GP Inc. (ESL). The submissions sought clarification on whether the List of Issues allows for:

a) the Board's examination of the tolling principles, tariffs and Transportation Services Agreement (TSA) approved in the OH-3-2007 decision;
b) the ESL tolls being subject to review effective 1 November 2010;
c) the Board's examination of "effective tolls";[8] and
d) consideration of whether the tolling principles, tariffs and TSA restrict access on the ESL pipeline.

a) The Tolling Principles, Tariffs and TSA Approved in OH-3-2007

BP Canada, Statoil and ESL requested that the Board clarify whether it intends, in this process, to consider the toll principles, tariffs and TSA which the Board considered and accepted in its OH-3-2007 decision. In addition, ESL requested that the Board clarify whether it has decided to review the toll principles in the TSA that the uncommitted toll would be at least equal to twice the committed toll.

8 The effective tolls refer to the toll that a shipper pays as a result of the refund provided by ESL to shippers at year-end as greater uncommitted volumes are shipped on the ESL pipeline.

In this proceeding, the Board intends to consider the underlying toll principles, tariffs and TSA, to the extent that they are relevant to the Board's consideration of the RH-1-2011 List of Issues. The Board is of the view that consideration of the toll without the underlying toll principles, tariffs and TSA would not properly address the issues brought up in Imperial's complaint regarding the toll.

b) ESL Tolls Subject to Review Effective 1 November 2010

Statoil sought clarification as to whether all the tolls paid by existing shippers – committed and uncommitted – are subject to review by the Board effective 1 November 2010.

On 29 October 2010, the Board directed that current tolls for all ESL shippers, including Committed Shippers, be interim effective 1 November 2010. Therefore, any determination made by the Board in the RH-1-2011 proceeding could impact both the committed and uncommitted tolls from 1 November 2010 and onward.

c) Examination of "Effective Tolls"

Imperial stated its understanding that where the List of Issues refers to "committed" and "uncommitted" tolls, the tolls comprise not only committed and uncommitted tolls but also the effective tolls payable by shippers.

The Board has already indicated that it will examine the underlying toll principles, tariffs and TSA, to the extent that they are relevant to the tolls being charged on the ESL pipeline. It follows that such an examination will also include an examination of the effective tolls payable by shippers, where relevant.

d) Consideration of whether the Tolling Principles, Tariffs and TSA Restrict Access

Imperial requested clarification as to whether the List of Issues encompasses the following:

> Do the terms and conditions of the toll principles, the tariffs and the TSA between ESL and its Committed Shippers unduly, unjustly or unreasonably restrict access to committed or uncommitted transportation service on the ESL pipeline?

Imperial requested that the Board add this question as a separate issue if it was not encompassed in the List of Issues. Imperial noted that the Committed Shippers have the right of first refusal on any capacity which is available on the ESL pipeline. In addition, Committed Shippers hold renewal rights when existing TSAs expire, as well as pre-emptive rights with respect to capacity additions due to pipeline expansions. In Imperial's view, these circumstances may have the effect of denying potential shippers access to the pipeline as Committed Shippers. Imperial stated that the actual consequences to persons wishing to acquire committed volume service on the ESL pipeline are unclear and therefore warrant detailed examination in this proceeding.

ESL submitted that the Board should reject Imperial's request. Among other reasons, ESL stated that Imperial provided no information to indicate that it wishes to access committed service on the ESL pipeline.

The Board has considered the comments received by Imperial and ESL. The Board also takes note of Imperial's 16 December 2010 response to the Board's information requests regarding its intentions to ship on the ESL pipeline. In its response, Imperial indicated it anticipates becoming a shipper on the ESL pipeline when it becomes economical to do so. Therefore, Imperial has not requested or been denied access to the ESL pipeline.

The Board notes that it established the RH-1-2011 proceeding to hear matters related to the committed and uncommitted tolls on the ESL pipeline. Issue 3 of the RH-1-2011 Hearing Order deals with whether the uncommitted toll is an unreasonable impediment to potential Uncommitted Shippers. Therefore any concerns about access due to the uncommitted toll are addressed by Issue 3. The Board recognizes that consideration of this issue may include examining sections of the tolling principles, tariffs and the TSA related to whether the tolls are an unreasonable impediment to access.

The Board did not intend that the RH-1-2011 proceeding would examine potential barriers to access that are not related to tolling. In the Board's view, concerns related to renewal rights and pre-emptive rights to possible capacity expansions is not within the scope of the RH-1-2011 proceeding. The Board is further of the view that consideration of this issue is premature, as it would be more appropriately considered once the Board has made a decision in this proceeding. If, after the Board's decision, Imperial requests access on ESL and is denied, it could complain to the Board at that time. Therefore, the Board denies Imperial's request to add its proposed question to the List of Issues to RH-1-2011.

2. Relationship between the RH-1-2011 proceeding and the OH-3-2007 decision

While the Board, in its OH-3-2007 decision, accepted the methodology, tolling principles and TSA, its decision did not have the effect of binding the Board in future Part IV determinations. When there is a complaint, the Board has an obligation, pursuant to section 62 of the *National Energy Board Act* (NEB Act), to make sure that tolls are just and reasonable. The Board recognized this obligation in the OH-3-2007 decision when it indicated that parties had a right of complaint to the Board in respect of any dispute regarding the tolls charged. The Board also stated in the OH-3-2007 decision that it would continue to monitor the application of the approved toll principles so as to make sure that the tolls would be just and reasonable.

The Board regulates Group 2 companies such as ESL on a complaint basis. As indicated in the Board's guidelines entitled *Financial Regulation of Pipeline Companies under the Board's Jurisdiction*, the Board may, upon receipt of a written complaint in respect of a toll charged by a Group 2 company, decide to examine the toll. It follows that the Board may also decide to examine any underlying principles on which the toll is based. In this case, the Board has decided to examine the complaint by way of a toll proceeding in which ESL is considered the applicant. Accordingly, the Board does not consider this proceeding to be a review and variance of OH-3-2007, as contemplated in section 21 of the NEB Act.

3. Timetable of Events

The Board received comments about the Timetable of Events from BP Canada and Statoil.

BP Canada submitted that if the Board intends to consider the toll principles, tariffs and TSA, the procedure established in the RH-1-2011 Hearing Order is unreasonable and unfair. In its view, the current procedure allows Imperial to raise issues and evidence to potentially threaten the investment made by BP Canada as a Committed Shipper. The current schedule does not allow BP Canada the opportunity to respond.

Statoil was of the view that Committed Shippers who executed their contracts with ESL and ordered their commercial affairs in reliance on the TSA should have a right to reply to Imperial's evidence. It noted that an amended timetable could permit shippers to file reply evidence on 6 September 2011 and ESL to file reply evidence on 13 September 2011, ahead of the 20 September 2011 commencement of the oral portion of the RH-1-2011 hearing.- 5 -

The Board notes the current Timetable of Events allows BP Canada and Statoil to make information requests to both ESL and Imperial. It also allows BP Canada and Statoil to further question ESL and Imperial during the oral portion of the hearing. The Board notes the comments regarding the potential impact to the commercial interests of Committed Shippers.

The decision in this proceeding may impact the tolling principles. Therefore, the Board has decided to revise the Timetable of Events. BP Canada and Statoil will be permitted to file evidence in reply to that filed by Imperial and other intervenors. BP Canada and Statoil will still be expected to file written evidence along with all other intervenors as per paragraph 15 of the RH-1-2011 Hearing Order.

Conclusion

Given the above, the List of Issues will remain the same as initially identified by the Board in Appendix 1 of the RH-1-2011 Hearing Order. However, the Board has modified the Timetable of Events, to allow for reply evidence from Committed Shippers prior to the reply evidence of ESL. The Board has also decided to provide ESL additional time for the filing of its additional written evidence. The revised RH-1-2011 Timetable of Events is attached.

With respect to ESL's additional written evidence, the Board notes that in its OH-3-2007 decision, it directed all ESL toll filings that are specified in a tariff to be accompanied with supporting documentation. As the tolls filed by ESL did not include such supporting documentation, ESL is directed to provide this documentation with its additional written evidence.

Yours truly,
Anne-Marie Erickson

Hearing Order RH-1-2011
Revised Timetable of Events

Actions	Hearing Order Reference	Person Responsible	Deadline (noon, Calgary time unless otherwise indicated)
Hearing Order issued		Board	28 March 2011
Serve Hearing Order on the persons listed in Appendix V	paragraph 19(a)	ESL	4 April 2011
Publish Notice of Public Hearing	paragraph 19(b), (c) and (d)	ESL	11 April 2011
Application to Intervene	paragraph 7(1)	intervenors	18 April 2011
Amendments to List of Issues	paragraph 8	All Parties	18 April 2011
List of Parties issued	paragraph 9	Board	21 April 2011
Application served on all Parties	paragraph 11	ESL	immediately after receiving the List of Parties
Interventions served	paragraph 15	intervenors	immediately after receiving the List of Parties
Additional Written Evidence	paragraph 12	ESL	13 May 2011
Information Requests to ESL	paragraph 13	Board and intervenors	3 June 2011
Responses to Information Requests	paragraph 14	ESL	24 June 2011
Letters of Comment	paragraph 6	Commenters	12 July 2011
Written Evidence	paragraph 15	intervenors	12 July 2011
Information Requests to the intervenors	paragraph 16	Board and other parties	2 August 2011
Responses to Information Requests	paragraph 17	intervenors	23 August 2011
Reply Evidence		Committed Shippers	6 September 2011
Reply Evidence	paragraph 18	ESL	13 September 2011
Begin the Hearing		*Board and all parties*	20 September 2011

Appendix IV

Board Ruling dated 30 August 2011

File OF-Tolls-Group 2-E242-2010-01 01
30 August 2011

Ms. Helene C. Long
Associate General Counsel
Enbridge Southern Lights GP Inc.
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Facsimile 403-231-7380

Mr. Don G. Davies
Partner
Macleod Dixon LLP
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400 - 3rd Avenue SW
Calgary, AB T2P 4H2
Facsimile 403-264-5973

Dear Ms. Long and Mr. Davies:

Hearing Order RH-1-2011 regarding Imperial Oil Complaint with respect to Enbridge Southern Lights GP Inc. (ESL) Tariffs No. 1 and No. 2
Notice of Motion to Strike Portions of evidence of Imperial Oil (Imperial)
Ruling no. 1

Background

On 9 August 2011 the Board received a Notice of Motion from ESL. In its Notice of Motion, ESL applied for an order of the Board striking the following portions of Imperial's evidence, filed on 26 July 2011, from the record:

Written Evidence of Imperial, paragraphs 111-116, 133 (lines 18-19)
Written Evidence of Elizabeth Crowe, A6(B), A21-A25
Written Evidence of Andrew Safir, A4 (page 7, lines 9-17), A31-A35

(the Evidence)

ESL submitted that the Board's 29 April 2011 letter concerning the RH-1-2011 List of Issues determined that the issue of pre-emptive rights to capacity, which the Evidence addresses, was not within the scope of the RH-1-2011 proceeding. ESL also noted that Imperial requested to strike section 6.06 from the ESL Transportation Service Agreement for the Southern Lights pipeline (TSA). ESL objected and submitted that parties should not be required to respond to a request for relief that is outside the scope of the proceeding.

Pursuant to subsection 35(4) of the *Rules of Practice and Procedure, 1995,* Imperial responded to ESL's Notice of Motion on 19 August 2011. Imperial stated that in the Board's 29 April 2011 letter regarding the List of Issues, it recognized that consideration of Issue 3 may include examining sections of the tolling principles, tariffs and the TSA related to whether the tolls are

an unreasonable impediment to access. Imperial submitted that there is an interrelationship between access to capacity on the Southern Lights pipeline and the issue of whether the uncommitted toll for uncommitted volume service is an unreasonable impediment to Uncommitted Shippers. Since the committed toll is a direct function of committed volumes, any change in this volume will change the tolls. Any restriction which limits increases in volumes will maintain the tolls at high rates, leaving Uncommitted Shippers to ship at the uncommitted toll or to negotiate service with Committed Shippers. Therefore, in Imperial's view, section 6.06 of the TSA creates a barrier to access related to tolling, which is an unreasonable impediment to Uncommitted Shippers.

In its reply dated 24 August 2011, ESL submitted that the Board is, in this proceeding, considering matters related to the committed and uncommitted tolls charged by ESL since 1 November 2011. It also stated that potential barriers to access, such as the first right provision in section 6.06 of the TSA, are not related to a determination of these tolls. Accordingly, ESL reiterated its request that the Board strike the Evidence.

Decision

The Board is of the view that in order for proceedings to be meaningful and efficient, the evidence provided must be relevant to that proceeding's issues. In determining whether to allow or disallow evidence, the Board's overriding consideration is to have a complete record on which to base its decision.

In respect of this particular proceeding, the Board notes that Issue 3 of the RH-1-2011 List of Issues deals with whether the uncommitted toll is an unreasonable impediment to potential Uncommitted Shippers. The Board also notes that it has already indicated that its consideration of the issues in this proceeding may include examination of sections of the tolling principles, tariffs and the TSA. Imperial states that the right of first refusal as contemplated in section 6.06 of the TSA could impact the volumes shipped on the ESL pipeline and consequently impact the tolls. Therefore, in the Board's view, Imperial has shown that there is an arguable connection between the Evidence and Issue 3. As a result, the Board is not prepared to strike the Evidence.

The Board has already stated that it intends to consider the underlying toll principles, tariffs and the TSA, including section 6.06, to the extent that they are relevant to the RH-1-2011 List of Issues.

The Board notes that although it is not prepared to strike the Evidence at this time, the Evidence may be the subject of future evidence and submissions concerning appropriate weight. The Board will carefully consider all submissions and evidence in its decision making.

Yours truly,

Anne-Marie Erickson
Secretary of the Board

cc: all Parties to RH-1-2011

Appendix V

Toll Order TO-02-2012

ORDER TO-02-2012

IN THE MATTER OF the *National Energy Board Act* (NEB Act) and the regulations made thereunder; and

IN THE MATTER OF NEB Tariff No. 1 (Tariff 1) and NEB Tariff No. 2 (Tariff 2) for service on the Southern Lights Pipeline, effective 1 July 2010, filed with the National Energy Board (NEB or Board) by Enbridge Southern Lights GP Inc. (ESL) on behalf of Enbridge Southern Lights LP and Enbridge Pipelines Inc. pursuant to paragraph 60(1)(b) of the NEB Act on 31 May 2010 under File OF-Tolls-Group2-E242-TFGen 01 01.

BEFORE the Board on 20 January 2012.

WHEREAS the Board issued Interim Order TOI-5-2010 on 29 October 2010, making Tariffs 1 and 2 interim effective 1 November 2010 for all ESL shippers;

AND WHEREAS Tariff 1 sets out rules and regulations for service on the Southern Lights Pipeline;

AND WHEREAS Tariff 2 lists the Committed and Uncommitted Tolls for service on the Southern Lights Pipeline in accordance with Tariff 1;

AND WHEREAS the Board considered Tariffs 1 and 2 in the RH-1-2011 proceeding in which it heard evidence and argument from ESL and interested parties;

AND WHEREAS the Board found that the Uncommitted and Committed Tolls were just and reasonable and the Uncommitted Toll was not unjustly discriminatory as set out in the RH-1-2011 Reasons for Decision;

THEREFORE, IT IS ORDERED, pursuant to Part IV of the NEB Act, that:

1. Tariffs 1 and 2 are approved for the period of 1 July 2010 to 31 December 2010.

2. The Committed and Uncommitted Tolls for service on the Southern Lights Pipeline contained in Tariff 2 are approved as final for the period of 1 July 2010 to 31 December 2010.

NATIONAL ENERGY BOARD

L. George
Acting Secretary of the Board